RIGHTS AND OBLIGATIONS OF POLICE OFFICERS QUESTIONED IN THE COURSE OF INVESTIGATIONS OF BREACHES OF DISCIPLINE AND OF PUBLIC COMPLAINTS

A Background Paper

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Introduction

1. I have been asked by the Police Complaint Commissioner of British Columbia, Mr. Don Morrison, Q.C., to prepare a paper on "whether and to what extent police officers are entitled to rely on protections against self incrimination - in refusing to answer questions during investigations into breaches of discipline?" The purpose of this paper is to provide information and assistance to the Police Complaint Commissioner in constructing a new Guideline for police officers in British Columbia "which clearly sets out the rights and responsibilities of Municipal Police officers in British Columbia, as potential respondents [and] as potential witnesses."

2. In preparing this paper, I have been asked to address five specific issues, as follows:

> "Approaches in other provinces, federal government and other governments, e.g. England, Australia, would be of assistance to me in the ultimate design of a Guideline.
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> Approaches with other comparative occupational groups, e.g. Correctional Services Canada, Canada Customs.
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> Referral to the present judicial interpretations of these statutory schemes - *Trumbley v. Metro Toronto* 29 DLR 4th 580-81, *PCC v. Kerr* (1997) 143 DLR 4th 471.
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> What are the requirements of constable to answer questions put by a supervisor or investigator in a disciplinary investigation? *Willette v. RCMP Commissioner* (1986) 70 NR 225 (Fed CA), *PCB v. Morris* 156 CLR @ 403 (Aust. H.C.).

Are the responsibilities of a Police Officer qua witness different than a Police Officer qua respondent?"

3. Rather than address each of these issues separately and seriatim, this paper is structured around a consideration of all of these issues together as they are reflected in the laws, policies and practices of a number of different jurisdictions in Canada and elsewhere. The paper begins with a consideration of some essential definitional issues, followed by a brief summary of the current situation in British Columbia, as it has been explained to me in consultations with various stakeholders held in April 2000. The paper then presents, in summary form, a review of the various options open to the B.C. Police Complaint Commissioner in resolving these issues, based on variations in practice and policy on these matters which are to be found in a number of other Canadian and foreign jurisdictions. Detailed information about the situation in these other jurisdictions is included, for reference purposes, in an Appendix to this paper.

Definitional issues

(a) "statements", "reports" etc.

4. Different jurisdictions employ different terms to describe various different kinds of compelled and voluntary oral or written statements and reports which a police officer may make following some incident in which he or she has been involved. Discussions with stakeholders in British Columbia and my research undertaken in the preparation of this paper identified a number of different terms referring to different kinds of such statements and reports, as follows:

1. Entries in an officer's notebook (which are required to be made as a matter of routine police duty following various kinds of incidents, occurrences or encounters in which the officer has been involved).
2. Oral or (more commonly) written reports about an incident, occurrence or encounter in which an officer has been involved, which are made either as a matter of routine police duty (often referred to as "occurrence reports"), or as a result of a specific demand by a senior officer with respect to a particular incident, occurrence or encounter for purposes of internal (and possibly later external) accountability (often referred to as "duty reports"), when no formal disciplinary allegation, public complaint or criminal complaint relating to the incident etc. has been made. This kind of report is referred to in one Canadian jurisdiction (Alberta) as an "explanatory report" and in another (Quebec) as a "report of activities".
3. A compelled oral or (more commonly) written statement following a specific complaint or disciplinary allegation with respect to which an investigation has been initiated. In some jurisdictions an officer may be given an opportunity to make a "voluntary" statement before a compelled statement is demanded, and in others certain officers (e.g. "subject officers" - see below) may be advised that under such circumstances they are not required to make such statements other than on a voluntary basis.
4. An officially "cautioned" oral or written statement made by an officer who is the subject of a formal *criminal* investigation.
5. A written report about an incident, occurrence or encounter which is the subject of a criminal prosecution, prepared for submission to prosecuting counsel ("Crown counsel report").

The distinctions which have been made in various jurisdictions between these different kinds of statements and reports have been considered important on the ground that in each different case the balance which ought to be struck between the interests of the officer concerned, the interests of the police service to which he or she belongs, and the wider "public interest" may justifiably differ. Thus, for instance, it has been suggested that with respect to the first two and the last of these kinds of statements or reports (officer notebooks and "occurrence reports"/"duty reports"/"explanatory reports"/"reports of activities", etc., where no disciplinary allegation, public complaint or criminal complaint has arisen, and "Crown counsel reports") the interests of the police service and of the wider community in full accountability for

police activities and the effective operation of the criminal justice system outweigh any interests of the individual officer in not putting him- or herself at risk of self-incrimination by making a statement or report, but that once some kind of allegation with respect to the incident has arisen and an investigation has been initiated (types 3 & 4), the balance of interests shifts more or less in favour of the officer's interest in protecting him- or herself from self-incrimination. In most jurisdictions such distinctions have been made, either in legislation or as a matter of policy, on policy grounds. Sc British Columbia would not necessarily be out of line with other jurisdictions if it did so too.

(b) "subject officers" and "witness officers"

5. In many jurisdictions, police officers are differently characterized either with respect to their obligations to make statements or with respect to the protections they enjoy having made a compelled statement, depending on whether their involvement in the incident etc. concerned was as a principal protagonist ("subject officer" in some jurisdictions) or merely as a witness ("witness officer" in some jurisdictions). This apparently straightforward distinction between "subject" and "witness" officers, however, is not always very easy to apply clearly in practice; it is recognized in many jurisdictions that as an investigation into an incident unfolds, an officer who at the outset appeared to be a "witness officer" may appear to have actually been a "subject officer" (i.e. an officer who is directly involved in the conduct or incident which is under investigation). The reverse may also sometimes be true, and in some cases (e.g. where the identity of officers involved is in dispute or not readily ascertainable), it may be difficult or impossible to determine definitively at critical stages of an investigation which officers were involved as "subject officers" and which as "witness officers".

6. These difficulties in distinguishing "subject" and "witness" officers are important because in many jurisdictions, officers who are considered to be "subject officers" are accorded more protections (e.g. they may not be required to make statements etc. at all or, if they are required to do so, such compelled statements may be protected from use or "derivative use" in some or all subsequent investigations or proceedings), than are granted to "witness officers". Such distinctions are typically justified on policy grounds, on the basis that "subject officers", because of their direct involvement in the incident etc. concerned, are more at risk from possible self-incrimination than "witness officers".

7. The practical difficulties which arise in applying this distinction between "subject" and "witness" officers have had very negative consequences in some jurisdictions in which typically *all* officers involved in incidents being investigated have claimed the right to the protections accorded to "subject officers" (but not to "witness officers") on the ground that they are all "potentially" designatable as "subject officers" at some point in the investigation. This has meant that the more stringent obligations on "witness officers" have, in practice, been rendered nugatory. The only way to avoid this situation is to give some official the power to make an authoritative characterization of officers as "subject" or "witness" officers, which is binding on those officers and effectively determines their legal obligations with respect to the giving of statements etc.

(c) "self-incrimination"

8. It is important to appreciate that the term "self-incrimination" has a technical legal meaning which is somewhat narrower than its meaning in popular discourse. Specifically, the courts have ruled that "self-incrimination" is to be understood as referring to a statement or act which potentially renders its maker subject to some legal proceeding or to a "penalty"; consequently, not every statement which may be against its maker's self-interest in some way will necessarily be "self-incriminating" in this legal sense. Furthermore, the courts have ruled that the protection against self-incrimination is a protection against "coerced" self-incrimination, and have defined "coercion" quite specifically. In the case of *Ontario (Police Complaints Commissioner) v. Kerr* , for instance, the Ontario Court of Appeal held that

admission into evidence of extracts from a police officer's notebooks (which had been completed as a matter of routine police duty after the incident in question and before any public complaint about the incident had been made) in a hearing of a public complaint by a Board of Inquiry would not violate the principle against self-incrimination or the principles of fundamental justice or fairness, principally because they had not been "coerced" in the sense contemplated by those principles. Citing the Supreme Court of Canada's decision in *R. v. Fitzpatrick* , the court observed that:

> "...where, as here, an individual is compelled to make a report, the fact that the report is compelled does not automatically render it inadmissible in criminal proceedings against the maker. A contextual approach which considers the circumstances of the case is necessary." (at p. 474)

The court described the relevant circumstances of this case as follows:

> "When the police officers prepared their notes, no complaint had been made against them. Officers...are required to make notes of events occurring while on duty. The essential purpose of requiring the officers to make notes is not to accumulate information that can later be used against *them*. Rather, the notes are made in the course of the officers' investigation of the wrongdoing of *others*. The notes were not compiled in a setting where it was contemplated that the officers and the state would be adversaries. Thus, [the] first requirement....for admitting the notebooks, namely *the lack of an adversarial context between the parties at the time the record was created*, is met in the present case.
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> The second requirement....is also met. The coercion imposed on the persons making the report was indirect, as it arose only after a conscious choice was made to be part of a regulated group. *The requirement to make notes was not an obligation imposed on the officer through the denial of free and informed consent between the state and the individual.* Police officers are required to make notes of their dealings with others, and persons who become police officers are aware of the obligation to keep notes when making their decision to join the profession. The mere possibility that the information the officers record in their notebooks may later be used in an adversarial proceeding does not mean that the state is guilty of coercing these individuals to incriminate themselves.
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> Third, the purposes behind the principle against self-incrimination are not threatened by allowing the [Police Complaints] Commissioner to use the officers' reports. This is not a situation where there has been any "confession". There is nothing stressful about the officers being required to make notes. The notes were not created after allegations of wrongdoing had been made. Rather, the notes, like business records, were made as contemporaneously as possible to the events they purported to record. *The officers' notebooks were compiled as part of their undertaking to serve the public and they would exist quite apart from any investigation into their alleged wrongdoing.* Furthermore, it is not abusive for the state to withhold the privilege against testimonial compulsion from a police officers' [*sic.*] notebooks. This is not a criminal prosecution. As in *Fitzpatrick*...the information recorded in the notes *does not deal with those aspects of individual identity which the right of privacy is intended to protect from state interference*. Privacy in the notes is lost by the requirement that they be inspected by the officers' superior at the end of each shift and turned over to the officer investigating a complaint. There is nothing unfair about not extending the protection [against testimonial self-incrimination at a hearing by the Board] afforded to police officers in s. 96(5) [of the Ontario *Police Services Act*] to notes made by the officers. The rationale behind the principle against self-incrimination has no application to the notes" (at pp. 475-6 - emphasis added)

It will be apparent that this explanation of the parameters of the principle against self-incrimination in Canadian law indicates that the principle will have different implications for the admissibility in legal proceedings of the different kinds of statements and reports referred to in (a), above. This is discussed further in the section of this paper entitled "Current legal and constitutional parameters", which follows.

Current legal and constitutional parameters

9. A provincial legislature is entitled to choose the policy it feels is most appropriate with respect to the obligations of police officers to co-operate in investigations of public complaints against police officers or the police service, disciplinary allegations and criminal complaints. Policies may (and do) thus differ substantially from one jurisdiction to another. Any policy which is adopted, however, must be consistent with certain legal and constitutional "ground rules" which have been established, for instance in the *Canadian Charter of Rights and Freedoms* (henceforth "the *Charter*"), and in decisions of the courts (case law). I refer to these legal and constitutional "ground rules" collectively as the legal and constitutional parameters within which any policy on this issue must be framed, and summarize these parameters in this section of the paper.

10. Neither the Constitution nor case law imposes any prohibition on legislation or policy imposing an obligation on police officers to provide statements or reports, or answer questions, concerning their activities while on duty, when required to do so either by routine orders or by specific demands by senior officers. A police officer who refuses or fails to meet such an obligation risks being disciplined for disobeying an order or neglect of duty. Both the Constitution and case law, however, impose constraints on the *uses* which may be made of such statements, reports and answers, and of *evidence which is derived from them* and would not have been otherwise discovered, when such statements, reports and answers are considered not to have been provided "*voluntarily*" (in a technical legal sense) or in accordance with other constitutional requirements, and it is these legal rules which establish the legal and constitutional parameters within which any policy with respect to the obligations of police officers to co-operate in investigations must be framed. They may be summarized under five broad headings:

> (1) The common law rules of evidence concerning pre-trial statements by persons accused of criminal offences (often referred to as the "*law of confessions*");
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> (2) The general common law *principle against self-incrimination*, now given the status of a constitutional protection by Sections 7, 11(c) and 13 of the *Charter*);
>
> (3) The common law *principles of "natural" or "fundamental" justice and fairness*, now also effectively subsumed within Section 7 of the *Charter*;
>
> (4) The constitutional *right of persons charged with offences to instruct counsel without delay*, enshrined in Section 10(b) of the *Charter*;
>
> (5) The constitutional *right of persons charged with offences to be informed of the charges which they face*, enshrined in Section 10(a) of the *Charter*.

A brief consideration of each of these follows:

(1) The "law of confessions"

11. Under the "law of confessions", a pre-trial statement by a person accused of a criminal offence will only be admissible in evidence without his consent at his or her criminal trial if the party seeking to admit it (typically the Crown) establishes that it was "voluntarily" made. "Voluntariness" in this context has a technical meaning; a statement is only "voluntary" in this sense if it was not made as a result of a "threat or inducement held out by a person in authority" or as a result of "oppression". Each of these terms ("threat", "inducement", "person in authority" and "oppression") has been the subject of extensive case law. It is not necessary to go into great detail about the technicalities of this case law, however, since it is sufficient here to say that a senior police officer who requires an

officer to make a statement would be considered a "person in authority", and a statement made pursuant to an obligation failure to meet which could result in discipline would be regarded as having been made as a result of a "threat" and/or "oppression", for the purposes of the law of confessions. In *Re Laroche and Biersdorfer* , however, the Federal Court of Appeal held that the mere possibility of coercion is not by itself sufficient to render a statement "involuntary" in this sense; coercion must actually have been applied (the officer, for instance, must actually have been ordered to make a statement).

12. The practical result of this rule is that a compelled statement by a police officer would be inadmissible as evidence in a subsequent criminal trial of that officer without his or her consent. The "law of confessions" thus imposes legal constraints on the use which can be made of such compelled statements in subsequent *criminal or provincial offence* proceedings against their maker. Any person accused of a criminal offence, including a police officer, is entitled to the protection of this legal rule. The rule, however, has no relevance for the admissibility of an officer's statement in other kinds of proceedings (such as disciplinary or public complaint hearings, a civil lawsuit, or any other administrative hearing).

(2) The principle against self-incrimination

13. As I have noted above, this principle has been technically defined by the courts (including the Supreme Court) in Canada. Specifically, a statement against its maker's self-interest will only be considered to be covered by the principle against self-incrimination if it is considered to have been made as a result of some "coercion" by the state. This concept of "coercion" is a technical one, and a statement will only be considered to have been "coerced" in this sense if the coercion is direct and the statement is made "in a setting where it was contemplated that [the statement's maker] and the state would be adversaries", in the context of an investigation of wrongdoing, and where the statement deals with "those aspects of individual identity which the right of privacy is intended to protect from state interference" (see the extracts from the *Kerr* decision, above). The principle against self-incrimination protects the maker of a statement which meets these criteria from its admission as evidence in subsequent legal proceedings against him or her without his or her consent. The principle certainly applies to criminal proceedings, but its application to other legal proceedings, such as police disciplinary and public complaint hearings, is less certain (see the discussion of the principles of "natural" and "fundamental" justice and fairness, and Section 7 of the *Charter*, below).

14. As the *Kerr* case illustrates, not all compelled statements or reports by police officers are protected by the principle against self-incrimination, even in criminal proceedings. Furthermore, the "contextual approach" to the application of the principle, referred to in the *Kerr* and *Fitzpatrick* cases (cited above), suggests that the principle is likely to be applied most protectively in criminal proceedings, and may well be less protective in its effect if applied to "administrative" proceedings such as police disciplinary or public complaint hearings, particularly when the proceedings are part of a scheme of regulation of a "regulated profession" such as the police service which the maker of the statement has freely joined.

15. It is important to note that the principle against self-incrimination can only be invoked by the person who is in jeopardy in the subsequent proceedings (i.e. is liable to some legal proceedings or penalty). This means that an officer who has given a compelled statement cannot invoke the principle against self-incrimination to prevent the admission of that statement as evidence of his or her lack of credibility as a *witness* in subsequent proceedings against some other person. Thus, for instance, a previously compelled statement of a police witness in a criminal trial may be introduced by the accused as evidence challenging the officer's credibility as a witness. Furthermore, the rules governing Crown disclosure of evidence would require the Crown to disclose such a statement to the accused, particularly if asked for it.

16. Finally, it must be noted that the principle against self-incrimination, when it applies, applies only to exclude those answers or parts of a statement which may tend to incriminate the officer or subject him or her to a proceeding or

penalty. Answers or parts of a compelled statement which are not incriminating in this sense are not protected from admissibility by the principle against self-incrimination.

(3) Principles of "natural" or "fundamental" justice and fairness

17. The principle against self-incrimination has been interpreted by the courts as one example of a more general set of principles concerned with "natural" or "fundamental" justice and fairness. Section 7 of the *Charter* protects Canadians (including, of course, police officers) from being deprived of "life, liberty or security of the person...except in accordance with the principles of fundamental justice". The applicability of Section 7 to "administrative" proceedings such as police disciplinary and public complaint hearings, however, has been the subject of conflicting judicial rulings and comments. In *R. v. Wigglesworth*, Wilson, J., of the Supreme Court of Canada, explicitly suggested that such proceedings are subject to Section 7 of the *Charter* . This observation was *obiter dicta*, however, and in other cases Section 7 has been held not to be applicable to such proceedings. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, Chief Justice Lamer of the Supreme Court of Canada, in upholding a mother's right to legal representation in child protection proceedings involving her child pursuant to Section 7 of the *Charter*, stated, referring to his decision in an earlier case:

> "...the subject matter of s. 7 is the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person. I hastened to add, however, that *s. 7 is not limited solely to purely criminal or penal matters*. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, - i.e., civil committal to a mental institution" (para. 65, at p. 149 - emphasis added).

The relevance and implications of Section 7 of the *Charter* for proceedings such as internal police disciplinary and public complaint proceedings, seems thus not to have been definitively resolved by the courts at this time. The better view, however, appears to be that while Section 7 may apply to such administrative proceedings, it does not necessarily preclude the admissibility in such proceedings of compelled statements made prior to the proceedings by a person who is the subject of the proceedings.

18. Another possibility is that even if Section 7 were held to automatically preclude the admissibility of such statements in such proceedings, it would still be possible for the courts to find them admissible by virtue of Section 1 of the *Charter* which allows derogations from *Charter* rights when they can de "demonstrably justified in a free and democratic society". It would be open to the courts to hold that effective public accountability of the police in a democracy is sufficiently important to justify the admissibility of such statements despite the fact that this would violate Section 7 of the *Charter*. The following comment by Chief Justice Lamer in the New Brunswick case just referred to, however, suggests that the Section 1 argument would not be well received by the Supreme Court:

> "First, the rights protected by s. 7 - life, liberty, and security of the person - are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specific-ally the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society." (para. 99, at p. 159)

Alternatively, such statements could be held to admissible under Section 24(2) of the *Charter* on the ground that, even though they violated Section 7, admitting them would not bring the administration of justice into disrepute. In *R. v. Calder* (1996) 105 C.C.C. (3d) 2, however, the Supreme Court of Canada held that admitting, at his criminal trial, a police officer's statement which had been obtained in violation of his right to counsel under Section 10 of the *Charter* would bring the administration of justice into disrepute.

19. In this context, the decision of the Federal Court of Appeal in the case of *Willette v. R.C.M.P. Commissioner* is particularly pertinent. In that case, the procedures under the *R.C.M.P. Act*, whereby an R.C.M.P. member could be ordered to answer "relevant questions" after he had declined to give a voluntary statement in connection with allegations of misconduct, and the answers he gave were admitted at a hearing of a Discharge and Demotion Board, were held not to violate the principles of natural justice, due process, the right to a fair hearing or the officer's rights under either the *Charter* or the *Canadian Bill of Rights*. The court emphasized that the regulations which provided a "quasi-judicial basis for a discharge procedure....do not exact the stringent evidentiary requirements and proof necessary in a criminal trial." The case stands for the proposition that the mere fact that a statement is compelled does not, by itself, in law prevent its admission as evidence in such administrative proceedings held under a statutory scheme for the regulation of a police service. The case also indicates that more stringent (and restrictive) rules apply to the admissibility of such statements in criminal proceedings against their makers. Since the *Willette* case was decided before the Supreme Court's decisions in *R. v. Wigglesworth* and *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, however, it cannot be said with certainty, in light of Wilson, J.'s and Lamer, C.J.'s comments in those cases, whether it reflects current judicial thinking about the applicability of Section 7 of the *Charter* to police disciplinary or public complaint proceedings.

(4) The right to counsel

20. Section 10(b) of the *Charter* provides that everyone has the right "on arrest or detention...to retain and instruct counsel without delay and to be informed of that right". In *R. v. Calder* , the Supreme Court of Canada held that the statement of a police officer which had been taken without observance of this right could not be admitted in evidence for any purpose at his subsequent criminal trial.

21. Unlike Section 11 of the *Charter*, however, which has been held to be applicable only to "truly penal" proceedings, the rights under Section 10 come into play for anyone "on arrest or detention". While it is clear that police officers who are being investigated in relation to a disciplinary allegation or public complaint which is not also a criminal allegation will not typically be under arrest, there remains the question of whether an officer who is required to make a statement in such circumstances could be regarded as under "detention" for the purposes of Section 10 of the *Charter*, and hence entitled to the rights guaranteed by that section. Somewhat to my surprise, I have been able to find no definitive answer to this question during my research in preparing this background paper.

22. The Supreme Court of Canada long ago held that the term "detention" in Section 10 of the *Charter* comprehends more than just physical restraint, and includes "psychological detention" - that is, a situation in which the person does not feel that he or she can leave without adverse consequences. Its decision on this point, however, was made in the context of a person suspected of a criminal offence who was being questioned by the police, and it is not clear whether the Court would take the same view of a police officer who is required by a superior officer to provide a written or oral statement or report in relation to a disciplinary allegation or public complaint. Since refusal to comply could itself constitute a disciplinary offence for which the officer could be charged and convicted, it might well be argued that such a situation fulfills the Supreme Court's requirements for a "psychological detention" (thus invoking Section 10 of the *Charter*, including the officer's right to "retain and instruct counsel without delay and to be informed of that right"). I have been unable to find any case which decides this question, however, and none of the various people with expertise whom I have consulted in preparing this background paper has been able to direct me to one. Consequently, the question of whether a police officer, when required by a superior officer to provide a statement in connection with a disciplinary allegation or a public complaint, has a right to instruct counsel without delay, and to be informed of that right, pursuant to Section 10 of the *Charter*, remains, as far as I have been able to tell, unresolved at this time.

23. As I have already noted above (paras. 17-19), the courts have rendered conflicting decisions concerning the applicability of Section 7 of the Charter to purely "admini-strative" proceedings such as disciplinary and public complaint proceedings, but the better view seems to be that even if it does, it does not extend as much protection in

such circumstances as when criminal or other penal proceedings are in issue. It seems possible, if not likely, that the courts would take a similar approach to the application of Section 10 of the *Charter* in such circumstances, and would accordingly not regard a police officer who is required to provide a statement in connection with a disciplinary allegation or a public complaint as being under "detention" for the purposes of Section 10 of the *Charter*. A case which is suggestive in this regard is that of *R. v. Shafie*, in which Krever, J., in delivering the judgment of the Ontario Court of Appeal, held that an employee who had been taken by his supervisor to be interrogated in the office of a private investigator hired by his employer to investigate allegations of theft had not been "detained" for the purposes of Section 10 of the *Charter*. Having stated this conclusion, Krever, J., went on to comment that:

> "Any other conclusion would result in the judicialization of *private relationships* beyond the point that society could tolerate. The requirement that advice about the right to counsel must be given by a school teacher to a pupil, *by an employer to an employee* or a parent to a child, to mention only a few relationships, is difficult to contemplate." (at p. 34 - emphasis added)

It must be noted, however, that the Ontario Court of Appeal stressed the "private" nature of the relationship in reaching this conclusion, and it is not clear that the courts would regard the relationship between a superior and a subordinate police officer, in the context of a disciplinary or public complaint investigation (especially a "public trust" complaint) as comparably "private".

24. In the much more recent case, *R. v. M.(M.R.)* involving a search of a student by a school vice-principal in the presence of a police officer who had been summoned for the occasion, Cory, J., writing for the majority of the members of the Supreme Court of Canada held that the schoolboy had not been "detained" for the purposes of Section 10b of the *Charter*. On the purposes and scope of Section 10(b) of the *Charter*, he wrote:

> "In my view that section was not meant to apply to relations between students and teachers, but rather *to relations between individuals and the state, usually focused upon the investigation of a criminal offence. The right to counsel provided in s. 10(b) was designed to address the vulnerable position of an individual who has been detained by the coercive power of the state in the course of a criminal investigation*, and is thus deprived of his or her liberty and placed at risk of making self-incriminating statements." (at para. 67, p. 390 - emphasis added).

25. An alternative, is that even if the courts held that Section 10 of the *Charter* is applicable to police officers in the context of disciplinary or public complaint investigations, they may still hold that compelled statements could be admitted as evidence in disciplinary or public complaint proceedings by virtue either of Section 1 or of subsection 24 (2) of the *Charter*. In *R. v. Lenihan*, for instance, the Nova Scotia Court of Appeal held upheld the trial court's decision to admit statements made by the accused in the course of an investigation under the provincial *Motor Vehicle Act* despite the fact that the requirements of Section 10 of the *Charter* had not been met. The court also concluded, *obiter*, that even if the provision of the Act which denied the accused a right to counsel in proceedings under the Act violated Section 10(b) of the *Charter* (a question it did not decide), it would be justified by Section 1 of the *Charter* in light of the important objectives of the Act ("to make highways safe" - p. 255) and the fact that it was a "regulatory" rather than a criminal statute. Whether a similar argument with respect to the importance of investigations of public complaints or internal disciplinary charges against police officers would succeed, remains a matter of speculation, however.

26. On balance, therefore, although the matter does not appear to have yet been definitively resolved by the courts, it seems likely that police officers would not be recognized as enjoying the right to instruct counsel under Section 10(b) of the *Charter* when under investigation in relation to disciplinary allegations or public complaints which do not also involve allegations of criminal offences, and that compelled statements taken when they have not been informed of, or accorded, the right to counsel, will be considered admissible in disciplinary or public complaint hearings.

(5) Right to be informed of charges/allegations

27. It is probable that the same arguments which have just been discussed with respect to the applicability of Sections 7 and 10(b) of the *Charter* with respect to the right to counsel, are equally applicable to Section 10(a) which accords a person "on arrest or detention" the right "to be informed promptly of the reasons therefor". This suggests that the mere fact that a superior officer does not clearly and promptly inform a subordinate officer about allegations against him or her when requiring him or her to provide a statement in connection with an investigation into a disciplinary allegation or public complaint, will not preclude the admission of the statement as evidence against him or her in subsequent disciplinary or public complaint proceedings. It is possible, however, that the courts would take a different view of the applicability of Sections 7 or 10(a) to such circumstances than they have done with respect to the applicability of Section 10(b), given the much less onerous and inconvenient nature of the Section 10(a) requirement, and its very direct relationship to the issue of self-incrimination. Since I have been able to find no case law on point on this possibility, however, it remains purely speculative.

Summary

28. From this brief account it will be apparent that the current constitutional and legal parameters within which any provincial policy with respect to compelled police officer statements must be framed are quite permissive. Orders by senior police officers requiring subordinate officers to furnish statements about their activities while on duty, when authorized by statute or regulations, are regarded as lawful orders which must be obeyed, and officers may be disciplined for non-compliance with them. This is the case whether or not such orders are given within the context of the investigation of a specific disciplinary default or public complaint, and whether the officer concerned is a "subject" or "witness" officer. Furthermore, the privilege against self-incrimination has been quite narrowly defined by the courts and although the matter is not entirely free from doubt, the better view appears to be that it is does not generally preclude the admissibility of compelled statements as evidence in subsequent "administrative" proceedings such as discipline or public complaint hearings of which their makers may be the subjects. The principles of "natural" or "fundamental" justice and fairness have similarly been held not to preclude the admission of a compelled statement against its maker's interests as evidence in an administrative discipline or public complaint proceeding against its maker. Nor, probably, would the denial of counsel or the failure to clearly inform an officer of allegations against him or her at the time of requiring a statement or report from him or her preclude the admissibility of such a statement or report as evidence against him or her in subsequent disciplinary or public complaint proceedings.

29. Even in relation to criminal and provincial offence proceedings and civil proceedings, the privilege against self-incrimination is only available to exclude those parts of the statement which are self-incriminating in a narrowly-defined sense of exposing its maker to legal proceedings or to a penalty. For any part of such a statement to be admissible in criminal or provincial offence proceedings against its maker without his or her consent, however, it must have been made in circumstances which meet the minimum requirements of the *Charter of Rights*; specifically, if the person concerned was detained or under arrest at the time the statement was made, the person must have been informed of the reason(s) for his or her arrest or detention, must have been accorded the opportunity to instruct counsel without delay, and must have been informed of this latter right.

30. Within these constitutional and legal parameters, provincial legislators are free, as a matter of policy, to accord police officers more extensive protections against either being required to make statements or, having made them, against their use (or the use of evidence "derived" from them) in legal proceedings falling within provincial jurisdiction, such as prosecutions for provincial offences, civil lawsuits and various kinds of administrative proceedings such as discipline or public complaint proceedings. Many provincial jurisdictions have provided their police officers with such additional protections. Provincial legislatures, however, cannot extend the protections applicable to the use

of such statements in criminal proceedings, since these are within the exclusive legislative jurisdiction of the federal Parliament. This means that a province cannot guarantee immunity from use either in criminal proceedings against the statement's maker, or as evidence relevant to the maker's credibility as a witness in a criminal prosecution.

The current situation in British Columbia

31. As I have been given to understand, police officers who may be regarded as "subject officers" in disciplinary and public complaint investigations in British Columbia have been accorded substantial protections from being required to give compelled statements or reports (commonly referred to in this jurisdiction as "duty reports or statements"). The relevant provisions of *Police Discipline Regulation* (330/75) under the *Police Act* before its provisions in this regard were amended in 1996, provided as follows:

> "10.(1) The investigating officer *shall obtain written statements from all witnesses to the alleged disciplinary default*, serve notice of the alleged disciplinary report in Form 2 upon the *accused member*, and ensure that *any statement the member may wish to make in reply to the allegation* is recorded in writing.
>
> (2) Where the matter being investigated may be both an offence punishable on indictment or on summary conviction and a disciplinary default under the code [of conduct], an interview with an accused member respecting the alleged offence shall first be completed in compliance with the usual investigative procedures respecting offences punishable on indictment or on summary conviction before service of Form 2 and compliance with the requirements of this regulation are carried out.
>
> (3) Where a member has been prosecuted in respect of an offence punishable on indictment or on summary conviction and has been acquitted, no disciplinary proceedings shall be taken under this regulation arising out of the same facts and circumstances.
>
> (4) Subsection (3) does not apply where the disciplinary proceedings relate to separate and distinct issues from those tried in the criminal proceedings.
>
> 11. (1) The investigating officer shall complete a report of his investigation and forward it, *together with statements of witnesses and any statement made by an accused member upon being served with Form 2*, to the chief constable or his delegate." (emphasis added)

Form 2, referred to in these provisions, advised an accused in the following terms:

> "Take notice that you are alleged to have committed a disciplinary default under the Code by…..
>
> *You are not obliged to say anything about this matter* but, if you do wish to give your version, it will be taken down in writing and may be used in any subsequent disciplinary proceedings." (emphasis added)

32. From this, it is evident that while "witness officers" were required to give statements, which could be used in subsequent disciplinary proceedings, "subject officers" (or, more accurately, "accused members") could not be required to give statements, and only statements given by them voluntarily and after service on them of Form 2 could be used in subsequent proceedings. When they were the subject of criminal allegations, they enjoyed the same rights as other citizens. I am told that if an officer gave a compelled statement at a time when he or she was considered to be a "witness officer", but subsequently became a "suspect officer", that officer's statement would not be used in subsequent disciplinary proceedings.

33. In 1994, the final report of the Commission of Inquiry into Policing in British Columbia (Mr. Justice Wallace Oppal, Commissioner) was published. In the report, the Commissioner wrote as follows:

> "Obligation to Give Evidence
>
> Under the present system, police officers have the right to remain silent during investigations and hearings so that they can protect themselves from having their statements used against them in subsequent disciplinary hearings, criminal or civil proceedings. On the other hand, an employer and the public have a right to know about the behavior of an officer during an alleged incident of misconduct. The present system does not adequately recognize this right. By comparison, witnesses in grievance arbitrations are required to testify but are protected by the BC *Evidence Act* and the Charter, which prevent statements from being used against them in other proceedings. Practitioners are also obliged to testify in other professional disciplinary proceedings. The best way to meet the interests of the public, employers and police officers is to require officers to give evidence during investigations and hearings but to protect them from having statements used against them without their consent.
>
> **Therefore the Inquiry recommends that:**
>
> **309. the province require a police officer to give evidence during investigations and at complaint and disciplinary hearings but ensure that the officer's statements are not admissible at any other proceedings unless the officer consents." (at pp. I-71-72)**

34. The Commissioner's recommendation in this respect appears to be at least partly reflected in the 1997 amendments to the 1996 *Police Act*, as a result of which the situation changed somewhat with respect to the investigation of public complaints. The procedures governing the investigation of "internal discipline complaints" under Division 6 of Part 9 of the Act may vary from one police service to another provided they are not inconsistent with the Act (Section 64). I have not been provided with copies of all the different procedures for each of the municipal police services, but I was given to understand during consultations in preparing this paper, that these generally follow the procedures under the Act prior to the 1997 amendments, as described above. I have also been told, however, that there is now considerable uncertainty within police circles as to what the rules on this matter now are in British Columbia.

35. With respect to investigations of the more serious "public trust" complaints under Division 4 of Part 9 of the Act, however, the rules are now different. Of considerable potential significance in this respect is subsection 50(4) of the Act, which provides:

> "(4) In exercising the police complaint commissioner's powers and duties under this Part in relation to a public trust complaint, the police complaint commissioner may receive *and obtain information respecting the complaint from the parties* and the disciplinary authority *in the manner the police complaint commissioner considers appropriate including, without limitation, interviewing and taking statements from* the discipline authority, the person making the complaint and *the respondent*." (emphasis added)

This provision clearly authorizes the police complaints commissioner to compel statements from police officers (including "subject officers" - "the respondent") who may be considered to be "parties" to the complaint. The ambit of this authority, however, is unclear because the Act does not specifically define who are "parties" to the complaint. One might reasonably infer from the language of subsection 50(4), however, that "witness officers" were not intended to be considered to be "parties" to the complaint for the purposes of this provision. If this is a correct interpretation, it will be evident that subsection 50(4) essentially reverses the situation from what it was before the 1996 amendments, at least as far as the powers of the police complaint commissioner to investigate "public trust" complaints is concerned - i.e. "subject officers" ("respondents") can be compelled to provide statements, but "witness officers" apparently cannot. It is not clear to me, however, that this was the intention when subsection 50(4) was drafted and enacted.

36. A further complication with subsection 50(4) arises from the fact that no mechanism is provided in the Act through which the police complaint commissioner can effectively compel compliance with a demand made pursuant to his or her authority under the subsection. Furthermore, the Act does not specify what the police complaint commissioner may do with statements obtained pursuant to this subsection, but again it may be reasonably inferred that at the very least the police complaint commissioner may take such statements into account in making decisions which he or she is authorized to make under Part 9, since otherwise there would be little point in authorizing the obtaining of such statements.

37. I have been informed, however, that the police complaint commissioner has so far never exercised the authority conferred by subsection 50(4).

Subsection 54.1(12) of the Act provides that:

> "(12) No oral or written statement made or given *by any person* in the course of an attempt to resolve the complaint informally may be used or received as evidence in any civil, criminal or administrative proceeding, including, without limitation, a public hearing" (emphasis added)

Although it is not clear whether it was intended, this provision appears to cover statements by "witness officers" as well as those by "subject officers".

38. Subsection 59(2) provides that "any other relevant written records" may be presented at disciplinary proceedings in connection with a public trust complaint. Presumably these may include records referred to in subsections 50(4) and (5) and 57(2), which could include compelled statements by "subject" or "witness" police officers involved. Paragraph 59.1(1)(b) requires a discipline authority to provide the police complaint commissioner with "the entire unedited record of the proceedings" for review following a disciplinary hearing. Although this paragraph does not specifically say so, it may reasonably be assumed that the "entire unedited record of proceedings" would include all the records which may have been "presented" at the disciplinary hearing under Section 59.

39. Paragraph 61(3)(b) provides that commission counsel may "introduce into evidence any record, including, without limitation, any record of the proceedings concerning the complaint up to the date of the hearing" at a public hearing into a public trust complaint under that Section. This provision would appear to be broadly enough worded to include the introduction of compelled statements of "subject" or "witness" police officers at a public hearing into a public trust complaint.

40. Finally, subsection 61.1(4) provides that:

> "(4) Nothing in this Act limits the rights of any person to the protection provided by the *Canadian Charter of Rights and Freedoms* against the use of voluntary or compelled statements in subsequent criminal or civil proceedings."

As noted above, these protections have been interpreted by the courts as not applicable to administrative proceedings such as disciplinary or public complaint hearings.

41. In light of these various provisions, it may be concluded that with the exception of statements made in the course of an attempt at an informal settlement of a public trust complaint (subsection 54.1(12)), the Act contemplates that both "witness" and "subject" officers may be required to provide statements in connection with the investigation of public trust complaints (subsection 50(4)), and that such statements may be used as evidence in discipline proceedings under Section 59 (subsection 59(2)) and in public hearings under Section 61 (paragraph 61(3)(b)). The admissibility of such statements as evidence in subsequent criminal, provincial offence, civil or other non-*Police Act* proceedings is governed by the general applicable rules, and is not

currently affected by the *Police Act* (subsection 61.1(4)).

42. Although I can find nothing in the *Police Act* at present which specifically *requires* police officers involved in a complaint, either as "subject" or as "witness" officers, to give statements relating to the events out of which the complaint arose to investigating police officers, there is also nothing in the Act which prevents them from being so required. Section 6 of the *Code of Professional Conduct Regulation* provides that "a police officer commits the disciplinary default of neglect of duty if (a) the police officer, without lawful excuse, fails to promptly and diligently (i) obey a lawful order of a supervisor of the police officer" and, as I have noted above, current case law in Canada indicates that an order by a senior officer to a subordinate officer to give a statement with respect to his or her activities while on duty is a lawful order. If a formal policy were in place requiring senior officers not to compel statements from subordinate officers under certain circumstances (e.g. if they are "subject officers" in relation to a complaint), this would probably provide officers with a "lawful excuse" for not obeying such an order in those circumstances.

The recently withdrawn guideline

43. Shortly after his appointment in 1998, the current Police Complaint Commiss-ioner issued a "Guideline" on this subject. I was provided with a copy of the revised (July 1st, 1999) version of this guideline, which reads as follows:

"Office of the Police Complaint Commissioner

Guideline on

Duty Reports and Statements by

Members pertaining to the Investigation of

Police Conduct

s. 54.1(12), 61.1(4)

Duty Reports

1. The investigator may order a duty report from any officer whom the investigator believes has information relating to a complaint.

Use of Statements and Duty Reports as Evidence

2. If the respondent in regards to the complaint makes a duty report or statement, the Discipline Authority shall not consider the respondent's duty report or statement for the purposes of s. 57.1(1) and s. 58 of the Act.

3. If the complaint matter proceeds to a discipline proceeding against the respondent under s. 58.1 of the Act, the Discipline Authority shall not consider the respondent's duty report or

statement for the purposes of the discipline proceeding.

4. If the complaint matter proceeds to a public hearing under the Act, the respondent's duty report or statement shall not be used or received as evidence against the respondent without his or her consent.

5. Notwithstanding paragraphs 3, 4 and 5 above, a respondent's duty report or statement may be received as evidence at any proceeding under the Act if, before providing the investigator with the duty report or statement, the respondent was served with a written warning in the attached form, pursuant to s. 73.

Quare: Use of duty report or statement where there is an allegation that, with intent to mislead, the officer gave the answer or statement knowing it to be false."

The "attached form" referred to in numbered paragraph 5 of this guideline, which is entitled "Notice to Respondent Regarding Statements", included the following statements:

> "Statements made by you in relation to the complaint prior to receiving this notice may not be considered at any discipline proceeding or public hearing arising out of the complaint at which you are a respondent.
>
> You are not obliged to make a statement about this matter but, if you choose to do so, any such statement may be considered by the Discipline Authority and may be used in any proceeding under the Police Act."

44. A number of observations may be made about this guideline. In the first place, it appears to reflect the practice in British Columbia prior to the 1997 amendments to the *Police Act*, as described above. Secondly, to the extent that it purports to exclude the use of compelled "subject officer" statements from being considered or being received in evidence in discipline proceedings under Section 58.1, and public hearings under Section 60.1, of the Act, it appears to be inconsistent with the provisions of subsection 59(2) and paragraph 61(3)(b), described above. Thirdly, it is not clear as to what relevance subsections 54.1(12) and 61.1(4), referred to under the heading of the guideline, have for the substance of the guideline, other than the fact that the former subsection prohibits the use of statements made *"in the course of an attempt to resolve the complaint informally"* in any subsequent proceedings. Subsection 54.1(12) does not affect the admissibility of compelled statements which may be made under other circumstances. As noted, the protections referred to in subsection 61.1(4) have been interpreted by the courts as not applicable to administrative proceedings such a discipline and public complaint hearings.

45. Finally, although the Police Complaint Commissioner is authorized by paragraph 50(3)(d) of the Act to "prepare guidelines respecting the procedures to be followed by a person receiving a complaint", the Act provides no indication as to what is the legal status of such a guideline. It is open to serious doubt as to whether such a guideline could have generally the force of law (in the sense that obedience to it is obligatory), and more particularly whether it can determine the legal admissibility of evidence in proceedings under the Act (particularly when its provisions appear to be inconsistent with those of the Act).

46. Since the guideline has since been withdrawn, the answers to these questions may now be "academic". I mention them, however, because they do raise the question as to whether, and to what extent, mandatory policy in this area can be effected through such a guideline (rather than, for instance, a formal regulation under the Act or, in the event that the desired policy were inconsistent with the current provisions of the Act, through amendments of the Act itself).

Furthermore, whatever the legal force of such a guideline, there is no doubt in my mind, in light of the consultations I had with stakeholders in preparation for writing this background paper, that the mere existence of the guideline which was issued and subsequently withdrawn has had some influence in shaping current thinking and attitudes as to what the policy on compelled statements in British Columbia should be. Specifically, there appear to be many stakeholders (especially among the police themselves) who are of the view that despite the provisions of the 1997 amendments to the Act, policy and practice on these matters should remain unchanged from what it was before those amendments were made (i.e. that long established practices on this matter in British Columbia should not be disturbed).

47. Since the guideline has now been withdrawn, I conclude that the current law on this matter in British Columbia is as I have stated it above (paras. 41 & 42).

Policy options for consideration

(a) Authority to require police officers to provide statements or reports in the course of investigations of disciplinary allegations or public complaints

48. At present, with one exception (subsection 50(4) of the *Police Act*, discussed above, and which has apparently never been exercised), no provincial legislation or policy in British Columbia specifically confers authority on anyone to *require* a police officer to provide a statement or report or answer questions in the course of an investigation into a disciplinary allegation or a public complaint. Rather, the police apparently regard this authority as implicit in the general authority which superior officers have over their subordinates. Nevertheless, in practice this authority is apparently not usually exercised in relation to officers who are considered to be the "subjects" of disciplinary allegations or public complaints, as opposed to "witness" officers, on the ground that to do so would violate such officers' legal privilege against self-incrimination. As I have indicated above, however, this view is not well founded, since the courts have held (a) that such an order would be a lawful order, disobedience to which may result in discipline, and (b) that the legal privilege against self-incrimination does not prohibit the subsequent use of such a compelled statement or report as evidence against its maker in "administrative" proceedings such as disciplinary or public complaint hearings.

49. The law thus currently allows considerable latitude with respect to regulation of this authority. The permissible options in this regard would include the following:

1. Leave things as they are.
2. Recommend repeal or amendment of subsection 50(4) of the *Police Act*, or limit the exercise of the authority conferred by it as a matter of policy
3. Specify, by regulation, guideline or some other kind of formal policy, the authority of superior police officers to require subordinate officers to provide such statements or reports, or to answer questions.

50. If option 2 is chosen, it would make sense to legislate some specific duty on police officers to co-operate or comply with a demand by the Police Complaint Commissioner (PCC) for an interview or a statement, and to answer the PCC's questions. For the current lack of any such provision is apparently one of the reasons why the authority of the PCC under subsectioin 50(4) has never yet been exercised.

51. If options 2 or 3 are chosen, provisions authorizing compulsion of statements from police officers could take a number of different forms, including the following:

- Provide that only "witness officers" can be ordered to provide statements etc.
- Provide that any officer can be so ordered

- Provide procedures for formally notifying officers as to whether they are considered to be "subject" or "witness" officers before requiring them to provide statements etc., and for notifying them of any subsequent changes to their status in this regard
- Provide definitional distinctions between "statements" and purely factual written "reports", and allow only one or the other to be compelled
- Provide that all officers (or only "subject officers") must be given an opportunity to consult with either legal counsel or a police association representative before having to comply with a requirement to provide a statement or report
- Provide that officers may or may not be required to answer, in writing or verbally, written or verbal questions concerning the incident in question
- Provide that officers who may not be required to give statements or reports, or answer questions, may nevertheless be invited to do so voluntarily
- Provide for a specific disciplinary default of failing to comply with a demand for a statement or report, or refusing to answer questions when required to do so by a superior officer, with appropriate penalty for failure to comply
- Provide that officers must be clearly informed, at the time they are required to provide a statement or report or answer questions, of:

    1. Any relevant disciplinary allegation or public complaint against (or involving) them
    2. Their right to consult with counsel and/or a police association representative before complying with the demand for a statement or report
    3. What uses may subsequently be made of any statements, reports or answers they may provide
    4. Their duty to comply with the demand, and the possible consequences to them of failing or refusing to comply

- Provide for procedures ensuring that officers involved in an incident which is the subject of a disciplinary or public complaint investigation are to be separated to ensure that they do not (have the opportunity to) collude in providing statements or reports, or answering questions, about the incident

- Provide that in the case of incidents which have been in some way traumatic for the officers concerned, a reasonable time will be allowed for the officer to calm down, and/or receive medical assistance or counselling, before any demand for a statement, report or interview is made

- Provide that where disciplinary allegations or public complaints also involve allegations of a criminal offence, any officer who is the subject of such allegations must be accorded the rights required to be accorded to any criminal suspect (i.e. right to remain silent, right to counsel, right to be informed of the allegation(s), etc.) at the time any demand for a statement, report or interview is made
- Provide that where disciplinary allegations or public complaints also involve allegations of a criminal offence, a separate investigation of the disciplinary or public complaint allegations may take place, in which the officer may be required to provide a statement or report, or answer questions solely for the purposes of the disciplinary or public complaint investigation (i.e. no such compelled statement will be available to investigators investigating the criminal allegations).

(b) Uses which may subsequently be made of compelled statements

52. As I have indicated above, the law in Canada currently places virtually no restrictions on the use which may be made of compelled police statements, reports and answers to questions, as evidence in subsequent disciplinary or public complaint proceedings, and that this permissiveness applies equally to statements, reports or answers given by

"subject" and "witness" officers. On the other hand, provincial legislation or policy cannot affect the uses to which any such statements, reports or answers may or may not be put in subsequent criminal or provincial offence proceedings, since these matters are governed by Federal legislation and by the *Charter*.

53. Within these legal and constitutional parameters, therefore, provinces have considerable flexibility with respect to regulating, through legislation or policy, what uses may or may not be made of compelled statements in subsequent "administrative" proceedings such as police disciplinary or public complaint hearings. Specifically, the options in this regard include the following:

- Distinguishing between different kinds of statements and reports (see para. 4, above), and providing that some are admissible in subsequent disciplinary or public complaint proceedings while others are not
- Providing that all such statements or reports are admissible in such proceedings
- Distinguishing between written statements and reports on the one hand, and written or verbal answers to written or verbal questions on the other, and providing that the latter are not admissible in such proceedings
- Providing that statements, reports or answers of "witness" officers are admissible, but that those of "subject" officers are not
- Providing that while some kinds of statements or reports by "subject" officers are admissible, others are not
- Providing that statements or reports are only admissible to prove that the officer made them knowing that they were untrue, or to impeach the credibility of their maker's testimony in a hearing, or to prove that their maker committed perjury

APPENDIX: LAW, POLICIES AND PRACTICES ELSEWHERE

Other Canadian jurisdictions

In the relatively short time available to undertake research in the preparation of this paper, it has not been possible to ascertain the precise details of legal rules, policies and practices with respect to these issues for all of the other Canadian jurisdictions. What follows, however, represents a fair picture of the variety of approaches to these issues taken in Canadian jurisdictions.

Quebec

The question of the rights and responsibilities of police officers when questioned by their superiors in connection with

investigations of disciplinary matters or public complaints has been the subject of a great deal of discussion recently in Quebec, but apparently has not so far been very satisfactorily resolved. The basic statutory rules governing the investigation of complaints by the Commissaire a la deontologie policiere (Police Ethics Commissioner) are to be found in the province's *Police Organization Act*, R.S.Q., c. O-8.1, Sections 84-87 of which provide as follows:

> "84. The Commissioner and any person acting as an investigator for the purposes of this division may require of any person any information or document he considers necessary.
>
> No person may hinder, in any manner whatever, the Commissioner or any person acting as an investigator for the purposes of this division, deceive him through concealment or by making a false declaration, *refuse to furnish him with information* or a document relating to the complaint he is investigating, refuse to allow him to make a copy of such a document, or conceal or destroy such a document.
>
> The Commissioner is vested, for the purposes of this division, with the powers and immunity of a commissioner appointed under the Act respecting public inquiry commissions (Ch. C-37), except the power to impose imprisonment.
>
> *Sections 84, 85 and 86 do not apply in respect of a police officer whose conduct is the subject-matter of a complaint.*" (emphasis added)

The legislation also provides for the possibility of conciliation of complaints in appropriate cases, but provides (in Section 61) that "no answer or statement made, in the course of the conciliation, by the complainant or the police officer whose conduct is the subject-matter of the complaint shall be used or admissible as evidence in any criminal, civil or administrative proceedings other than a hearing before the Comite de deontologie policiere into an allegation that with intent to mislead the police officer gave the answer or statement knowing it to be false."

With respect to hearings before the Comite de deontologie (the Ethics Committee), which may follow an investigation by the Police Ethics Commissioner, the Act provides that the Commissioner and the cited police officer are the parties to the case (Section 114), that each party shall summon the witnesses whose testimony may be useful and may require the production of any document (Section 119), and that "for the purposes of this [latter] section, the cited police officer is regarded as a witness." Section 118 provides that the Ethics Committee "may have recourse to any legal means to ascertain the facts alleged in the citation; with the consent of the parties, the Committee may also, at its discretion, admit evidence obtained outside the hearing."

That this regime has been interpreted to permit statements to be required of "witness officers" but not of "subject officers" during investigations of complaints is confirmed by a policy issued by the Ethics Commissioner in 1991. Having distinguished between "Le temoin policier" (witness officer) and "Le policier concerne" (subject officer), however, this policy went on to state (my translation): "On the other hand, the investigator is not authorized to tell anyone whether the inquiry will lead to a citation or not since this responsibility rests exclusively with the Commissioner."

I have been told by one experienced observer in Quebec that this last statement in the policy has led to a situation in which the distinction between "witness officers" and "subject officers" has in effect broken down, since police officers can always claim that they are "potential" subject officers, and therefore not required to give statements or provide information, and that police officers are routinely advised by their unions not to give statements or provide information to investigators for this reason.

As is pointed out in a document prepared by M. Denis Asselin, Director of Legal Affairs for the Montreal Urban Community Police Service in February 1996, entitled "Obligation du Policier de Rendre Compte de ses Activites" ("Obligation of Police to Account for their Activities") both the regulations governing discipline for the

Montreal police and the Quebec Provincial Police (Surete du Quebec), require police officers to account to the heads ("Directeurs") of their police services for their activities while on duty (and, in the case of the Montreal police, while off duty when such activities are police-related), and provide that it is a disciplinary offence to refuse or omit to do so. Section 87 of the regulation governing the Surete du Quebec provides that "in the application of this regulation, a member [of the S.Q.] is not required to provide a statement but he must however provide, in accordance with a demand by a superior, a report concerning his activities undertaken in the course of his work" (my translation). As I shall note below, this distinction between a "statement' and a "report of activities" has most recently been the subject of a unanimous ruling of the Court of Appeal of Quebec.

In his memorandum, M. Asselin concludes, on the basis of a review of relevant case law on this issue in Quebec, that the obligations of "witness officers" ("le policier temoin de l'evenement") and "subject officers" ("le policier directement implique") differ in this respect. While both are always required to furnish the "administrative reports" required of them pursuant to the regulations, "subject officers" are entitled, once they have submitted such reports, to choose whether or not to respond to questions put to them by investigators, without fear of being the subject of disciplinary sanctions if they refuse, "from the moment when the investigation points to a police officer as a criminal suspect." The memorandum goes on to point out (citing the decision of the Supreme Court of Canada in *Calder*, discussed below) that any such declaration by a police officer will normally be inadmissible in any subsequent criminal proceedings which may be taken against him or her, as a result of the common law with respect to confessional evidence and the right against self-incrimination under the *Charter of Rights*.

As I have already noted, however, such a distinction between "witness" and "subject" officers does not appear to have proven very workable in practice in Quebec because of the apparent ease with which police officers can succesfully claim that they are "potential" subject officers, and therefore entitled not to answer questions or give statements. These issues were recently addressed in the report of the Commission of Inquiry into the Surete du Quebec (the Poitras Commission), which recommended revisions and clarifications of the law on this matter. Specifically, the Commission recommended that the right of "subject officers" to refuse to furnish information to investigators investigating purely disciplinary matters, under Section 87 of the *Police Organization Act*, be revoked "in order to re-establish a just balance between the rights and duties of police officers" (Recommendation 155 - my translation). The Commission also recommended, however, that investigators be required to indicate to police officers the basis on which their investigation is being undertaken - specifically, whether it is a criminal investigation or a purely administrative (disciplinary) investigation - and that where an investigation involves the possibility of criminal charges, a police officer who is, or is suspectible of becoming, the subject of such allegations should have the right to remain silent and not answer investigators' questions (see Report, pp. 1583-4).

In September 1999, the Quebec Court of Appeal, in an unanimous judgement in the case of *Association des Policiers Provinciaux du Quebec v. Lauzon et Surete du Quebec* [No. 500-09-002175-933] considered Section 87 of the *Reglement sur la deontologie et la discipline des membres de la Surete du Quebec*, as well as Section 87 of the *Police Organization Act*. The court held that a requirement by a superior officer that SQ members who were implicated in a public complaint concerning their conduct in arresting the complainant, provide written answers to a questionaire containing twenty detailed questions concerning the incident in question, constituted a demand for a report of their activities and not a demand for a "statement" from them, and that they were therefore required to obey this demand and were not entitled to decline to do so by virtue of Section 87 of the regulation. The court also noted that "the right to silence in disciplinary matters has not been recognised by the courts, by virtue of the Canadian *Charter* [*of Rights*]" and that such a right is only recognized in the case of complaints involving "penal consequences". The court held that Section 87 of the regulation should be interpreted in light of Sections 84-87 of the *Police Organization Act*, and concluded (per Robert, J.C.A.):

> "Section 87 [of the *Police Organization Act*] makes, I believe, the distinction between a police officer who is the subject of a complaint ["plainte"] and a police officer who is the subject of a disciplinary citation ["citation disciplinaire"]. In this context, the word "complaint" refers to a penal complaint and the section therefore confers the right to silence in criminal matters. Section 87 of the regulation must be interpreted in

> light of this context and applies this right to silence in criminal matters and not in disciplinary matters." (p. 20 of the judgement of the court - my translation)

A Bill (Bill 86) which bears on these matters is currently before the National Assembly in Quebec, but has not yet been passed into law. The Bill contains the following provisions:

> "260. Every police officer must inform his Director of behaviour of another police officer which is susceptible of constituting a disciplinary or ethical default touching on the protection of rights or security of the public or which is susceptible of placing in question the bond of trust between the employer and the police officer, particularly when such behaviour could constitute a criminal offence.
>
> In addition, he must participate in or collaborate with any investigation relating to such behaviour.
>
> 262. Every police officer involved as a witness respecting a complaint against another police officer must provide a complete written and signed statement.
>
> He must also submit a copy of his personal notes and of all reports relevant to an examination of the complaint.
>
> 263. When questioning or receiving a statement from a police officer who is the subject of a complaint involving allegations which are criminal in nature, the investigator must:
>
> advise the police officer that he is the subject of the complaint;
>
> adminster the usual cautions;
>
> inform him that he is not required to make a statement with respect to the complaint of which he is the subject." (my translation)

These provisions, if enacted will closely implement the specific recommendations of the Poitras Commission on this subject.

Ontario

As might be expected, these issues have been no less controversial in Ontario in recent years. Most of the discussion of them has emerged around the role of that province's Special Investigations Unit (S.I.U.), and the provision of subsection (7) of Section 113 of the *Police Services Act* which provides that "Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations". To understand the debate which has surrounded this provision, however, it is essential to understand that the statutory function of the S.I.U. is to "cause investigations to be conducted into the circumstances of serious injuries and deaths *that may have resulted from criminal offences committed by police officers*" (emphasis added). Investigations by the S.I.U., therefore, are by definition *criminal*, not disciplinary, investigations, and this fact has coloured the entire debate about the extent to which police officers - particularly "subject officers" - are or should be required to co-operate with S.I.U. investigators, and may be required to provide statements or answer questions in the course of such investigations.

I do not propose to detail the lengthy debates over this issue which have gone on incessantly since the S.I.U. (which is an unique Canadian institution) was established ten years ago - such an account would itself fill a very lengthy memorandum. So far, however, it has culminated in the following situation:

In 1998 a regulation (Regulation 673/98) was passed governing the "Conduct and duties of police officers respecting investigations by the Special Investigations Unit". The regulation begins with definitions of a "subject officer" ("a police officer whose conduct appears *in the opinion of the SIU director*, to have caused the death or serious injury under investigation" - emphasis added) and a "witness officer" ("a police officer who, *in the opinion of the SIU director*, is involved in the incident under investigation but is not a subject officer" - emphasis added). It will be noted at once that these definitions seek to avoid the kind of practical difficulties which have apparently been experienced with such a distinction in Quebec whereby police officers themselves (often on the advice of police union representatives) have assumed the responsibility for defining themselves as being in, or "potentially" in, one category or another. Under the Ontario regulation, the S.I.U. Director has the exclusive authority to apply such designations in a particular case, and police officers are bound by his or her decisions in this respect.

Only "witness officers" may be required to submit to interviews by S.I.U. investigators, and a request for such an interview must be made in person (Section 8). Section 10 of the regulation requires the S.I.U., before requesting an interview with a police officer or before requesting a copy of his or her notes on the incident, to advise the relevant chief of police and the officer concerned in writing as to whether the officer is considered to be a subject officer or a witness officer. If, as the investigation proceeds, the S.I.U. changes its view as to which category applies to a particular officer, it must advise the chief of police and the officer concerned of this, again in writing. If an officer is interviewed as a "witness officer", but the S.I.U. subsequently considers him or her to be a "subject officer", the S.I.U. is required to give the police officer the original and all copies of the record of the interview, and give the chief of police all copies of the police officer's notes. This requirement reflects the view that the content of such an interview would not be admissible in evidence against the officer in any subsequent criminal trial of the officer, in light of case law discussed below.

Section 11 of the regulation requires the relevant chief of police to cause a parallel investigation to be conducted "forthwith" into any incident with respect to which the S.I.U. has been notified, "subject to the S.I.U.'s lead role in investigating the incident", and where the S.I.U. has given the original and copies of a police officer's notes to a chief of police, as described in the preceding paragraph, the chief of police is required to keep these notes "for use in his or her investigation under Section 11". The purpose of the chief of police's parallel investigation is "to review the policies of or services provided by the police force and the conduct of its police officers" (subsection 11(2) - i.e. a potentially disciplinary investigation), and subsection 11(3) provides that "all members of the police force shall co-operate fully with the chief of police's investigation." This requirement applies equally to "subject" and "witness" officers.

These provisions reflect closely the recommendations of a *Consultation Report Concerning Police Co-operation with the Special Investigations Unit*, prepared by the Hon. George Adams, Q.C., and submitted to the Provincial Attorney-General in May 1998. This report is very comprehensive in addressing these issues. In the course of his report, Mr. Adams, after a review of the relevant case law, recommended that only "witness officers" should be required to submit to interviews by S.I.U. investigators, and that:

> "Recommendation 10:
>
> The Attorney General should direct Crown counsel by means of a Crown policy that a police officer's statement obtained by the SIU in a compelled interview is an involuntary statement. In light of this fact and requirements of the *Charter*, the policy shall provide that neither the statement nor any evidence that would not have been found but for the statement will be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize that the statements cannot be used for the purpose of impeaching credibility, but these immunities would not apply in any prosecution concerning the intentional giving of a false statement."

With respect to police notebooks, Adams recommended that:

"Recommendation 14:

The regulation should confirm that witness officers must complete their notebooks in full as currently required and police services must provide such notebooks to the SIU forthwith upon request, but subject to the same procedures and Crown policy applicable to their oral statements. Subject officers shall also continue to be required to complete their notebooks in full and to provide them to their police services, but they shall not be provided to the SIU. Subject officers, by a Crown policy, will also be assured that their notebook accounts and any evidence that would not have been found but for their notebook accounts will not be used to incriminate the officers in any subsequent criminal proceeding. The policy should also recognize that the statement cannot be used for impeaching credibility, but the immunity would not apply in any proceeding concerning the giving of a false statement."

This recommendation, other than those parts of it recommending the adoption of Crown policy, has now been implemented through Section 8 of *Regulation 673/98*.

With respect to investigations in Ontario which do not involve the S.I.U.'s jurisdiction, practice has been particularly shaped by a number of significant court decisions. In *Trimm v. Durham Regional Police* [1987] 2 S.C.R. 582, and *Trumbley and Pugh v. Metropolitan Toronto Police* [1987] 2 S.C.R. 577, the Supreme Court of Canada held unanimously that Section 11 of the *Charter of Rights* was not applicable to proceedings under the Ontario police disciplinary regulation at the time, since the section was intended to apply only to proceedings which are "criminal in nature" or involve "penal consequences", and that internal police disciplinary proceedings do not have these characteristics.

In *R. v. Calder* (1996) 105 C.C.C. (3d) 1, the accused, a police officer, had been investigated in connection with allegations that he had unlawfully attempted to purchase the sexual services of a person under 18 years of age, and had committed extortion and breach of trust. Prior to being charged, Calder was cautioned by the investigating officers in the following terms: "...we are investigating alleged sexual misconduct which could result in criminal charges or charges under the *Police Act*. You do not have to say anything unless you wish to do so, but whatever you say may be given in evidence at the criminal trial or a trial under charges under the *Police Act*. Do you understand?" When Calder then asked "What's with the caution?" and "Why the caution?", no further explanation of the caution was given to him. At trial, the statements he made following this caution were held inadmissible on the ground that the investigating officers had breached Section 10(b) of the *Charter* (right to counsel). The Crown subsequently attempted to introduce Calder's statements to impeach his credibility, since they were inconsistent with subsequent admissions which he had made to the police, but the trial judge held that they were inadmissible for this purpose also, as a result of which Calder was acquitted on all charges. The Crown's appeal from Calder's acquittal was dismissed by the Ontario Court of Appeal, whose decision in the matter was upheld by a majority of the Supreme Court of Canada on further appeal. The case makes it clear that as far as criminal proceedings are concerned, a police officer suspect has the same procedural rights as any other citizen; pre-trial statements made by the accused must be both voluntary and acquired in conformity with the *Charter of Rights* to be admissible in any subsequent criminal trial.

Under the statutory provisions with respect to the proceedings of Boards of Inquiry appointed to hold hearings into public complaints against police officers in Ontario in force at the time a police officer who was the subject of such a complaint could not be compelled to testify at such hearings. In *Ontario (Police Complaints Commissioner) v. Kerr* (1997) 143 D.L.R. (4^{th}) 471, the Ontario Court of Appeal was asked to rule on whether, despite the testimonial immunity of subject officers in such proceedings, extracts from the officers' notebooks (which they were required, by police force regulations, to complete at the end of their shift, and which they were required to turn over to the police officer in the Police Complaints Investigation Bureau investigating the public complaint) could be introduced as evidence in such proceedings. Relying on the principles with respect to the rule against self-incrimination enunciated by the Supreme Court of Canada in the earlier cases of *R. v. Hawkins* (1996) 141 D.L.R. (4^{th}) 193 and *R. v. Fitzpatrick* (1995) 102 C.C.C. (3d) 144, the court held unanimously that the extracts from the notebooks could be admitted in the

Board of Inquiry proceedings without violating the principle against self-incrimination. In particular the court referred to the Supreme Court's conclusion in *Fitzpatrick* that "where...an individual is compelled to make a report, the fact that the report is compelled does not automatically render it inadmissible in criminal proceedings against the maker." The court in *Kerr* held that "the principle against self-incrimination which is encompassed within s. 7 of the Charter would not extend to the officers' notebooks in this case", and that the principles of fundamental justice and fairness similarly did not preclude the admission of this evidence (at p. 476). The court noted that:

> "Police officers are required to make notes of their dealings with others, and persons who become police officers are aware of the obligation to make notes when making their decision to join the profession. The mere possibility that the information the officers record in their notebooks may later be used in an adversarial proceeding does not mean that the state is guilty of coercing these individuals to incriminate themselves." (at p. 475)

In light of this case law, it appears now to be accepted in Ontario that police officer statements which are compelled in the course of an investigation are admissible in hearings with respect to public complaints and in disciplinary hearings, but not in any criminal proceedings which may be taken against the maker, and that compelling an officer to make a statement in the course of a purely criminal (as opposed to a purely "administrative" public complaint or disciplinary) investigation constitutes a violation of the officer's *Charter* rights.

Nova Scotia

In the time available to me to prepare this report, I have not been able to obtain complete information about this issue as it is understood in Nova Scotia. I did, however, receive a most helpful letter on the subject from the Director of the Nova Scotia police Commission which indicates that the situation there is somewhat unclear. It is clear from this letter, however, that in practice a distinction is made between "subject" and "witness" officers, with the latter being commonly required to provide statements which are then admitted as evidence in disciplinary or complaint proceedings, while the former ("subject" officers) are in practice never required to give statements during the course of such investigations.

Because the N.S.P.C. Director's letter to me is relatively short and very clear, I have included it in its entirety at the end of this Appendix.

Manitoba

I have not obtained complete information about the situation (especially within police services) in Manitoba. The *Law Enforcement Review Act*, R.M. 1987, c. L75, there, however, which establishes a Commissioner and a Law Enforcement Review Board who handle public complaints against the police, contains a specific provision (Section 19) that a police officer who is the subject of a complaint "is not bound to make any statement to the Commissioner or to anyone employed by the Commissioner." Another section of the Act (Section 20) provides that, with one exception, no statement made to the Commissioner, or to anyone employed by the Commissioner, by a police officer who is the subject of a complaint is admissible at any hearing without the consent of the respondent, and that a statement made by such an officer "for purposes of resolving the complaint" informally under the Act "is privileged for all purposes, including an action arising out of the same facts as the complaint."

In the time available to me, I have not been able to ascertain what either the law or current practice is in Manitoba with respect to the possibility of statements being compelled internally within police forces from either "subject" or

"witness" officers during the course of investigations of complaints or disciplinary matters.

Alberta

Section 10 of the Alberta *Police Service Regulation* (A.R. 356/90) provides that:

> "10(1) Where an investigation is carried out in respect of a complaint as to the actions of a police officer, the police officer shall be advised as to the details of the complaint and be provided with a copy of all statements made by the complainant.
>
> (2) A police officer in respect of whom an investigation is being carried out may, on a voluntary basis, provide the investigator with an explanatory report setting out his version of the subject-matter of the complaint.
>
> (3) Where
>
> > (a) a police officer in respect of whom an investigation is being carried out is directed by his superior officer to provide an explanatory report setting out the police officer's version of the subject-matter of the complaint, and
> >
> > (b) pursuant to that direction the police officer provides an explanatory report,
>
> that explanatory report shall be regarded as an involuntary statement and shall not be admissible in evidence in any proceedings carried out under the [Police] Act, except to prove that the statement is false.
>
> (4) Where
>
> > (a) a police officer who might reasonably have knowledge of matters pertaining to a complaint or report is directed by his superior officer to provide an explanatory report setting out his knowledge of any matters pertaining to the matter under investigation, and
> >
> > (b) pursuant to that direction the police officer provides an explanatory report,
>
> that explanatory report shall be regarded as an involuntary statement and shall not be admissible in evidence in any proceedings carried out under the Act against him, except to prove that the statement is false.
>
> (5) Nothing in this section shall be construed so as to require a police officer to make a statement."

While these provisions implicitly suggest that both "subject" (subsection 10(3)) and "witness" (subsection 10(4)) police officers can be required to provide "explanatory reports" in the course of disciplinary investigations, subsection 10(5) has apparently been interpreted so as to preclude these possibilities. While the regulation appears on its face to make a distinction similar to that between "statements" and "reports of activities" found in the regulation governing the Surete du Quebec discussed above (at pp. 3 & 5), I have been advised by the Chairman of the Alberta Law Enforcement Review Board (LERB) that: "The words "explanatory report" and "statement" are used in Section 10 to mean much the same writing (10(3)) and no interpretation has been issued that would indicate otherwise." In effect, therefore, it appears that no police officer statements can in practice be compelled in Alberta, despite the provisions of subsections 10(3) and 10(4) of the *regulation* which appear to provide for such compulsion.

The R.C.M.P.

Section 40 of the *R.C.M.P. Act*, R.S.C. 1985, c. R-10, as amended, makes provision for the investigation of allegations of breaches of the Code of Conduct for this police service. Subsections 40(2) and (3) provide that:

> "(2) In any investigation under subsection (1), no member shall be excused from answering any question relating to the matter being investigated when required to do so by the officer or other member conducting the investigation on the ground that the answer to the question may tend to criminate the member or subject the member to any proceeding or penalty.
>
> No answer or statement made in response to a question described in subsection (2) shall be used or receivable in any criminal, civil or administrative proceedings, other than a hearing....into an allegation that with intent to mislead the member gave the answer or statement knowing it to be false."

It will be noted that these provisions make no distinction between "subject" and "witness" officers. Similar provisions require witness officers to answer questions at an adjudication board hearing, while protecting them from the use of such answers against them in disciplinary proceedings under the Act, other than hearings into allegations that they deliberately misled the board (subsections 45.1(10) & (11)).

Prior to the enactment of these provisions, a compelled statement was admissible in disciplinary proceedings under the Act, and the Federal Court of Appeal had held that such proceedings were not to be equated with a criminal trial. The court held that the admission of such statements did not, by itself, constitute a violation of Sections 1(a) or 2(e) of the *Canadian Bill of Rights*, or of Section 7 of the *Charter of Rights and Freedoms*. In addition, the court held that Section 11 of the *Charter* was not applicable to such disciplinary proceedings (*Willette v. R.C.M.P. Commissioner* (1987) 70 N.R. 225, at pp. 231-233) In *Re Laroche and Biersdorfer* (1981) 131 D.L.R. (3d), 152, the Federal Court of Appeal held that where, after being cautioned, a member of the R.C.M.P. voluntarily makes a statement to investigating officers, the fact that if the member had not given such a voluntary statement he could have been (but was not) directed to give a statement and that refusal to give a statement following such a direction could result in a disciplinary charge for refusal to obey a lawful order, did not render the member's statement "involuntary" (at pp. 169-170).

Some foreign, common law jurisdictions

Cautionary Note: Care must be exercised is assessing the relevance or applicability of regimes in foreign jurisdictions to the Canadian situation, since the legal and constitutional parameters in such jurisdictions are usually not entirely consistent with that in Canada. For instance, laws and policies in this area in Britain and Australia are not constrained by the provisions of any constitutional Bill or Charter of Rights, as they are here in Canada, while the terms and implications of the U.S. *Bill of Rights* in this regard are different in significant respects from those of the *Charter of Rights* in Canada.

(a) England and Wales

The law and practice on this issue in England and Wales has very recently been revised. Under the *Police (Conduct) Regulations, 1999*, SI 1999/730, a police officer who is the subject of a complaint or allegation of misconduct ("the member concerned") is to be given written notice

"(a) that there is to be an investigation into the case;

(b) of the nature of the report, complaint or allegation;

(c) informing him that he is not obliged to say anything concerning the matter, but that he may, if he so desires, make a written or oral statement concerning the matter to the investigating officer or to the chief officer concerned;

(d) informing him that if he makes such a statement it may be used in any subsequent proceedings under these Regulations;

(e) informing him that he has the right to seek advice from his staff association, and

(f) informing him that he has the right to be accompanied by a member of a police force, who shall not be an interested party to any meeting, interview or hearing." (Regulation 9)

The Regulations also provide that: "Where there are criminal proceedings outstanding against the member concerned, proceedings under these Regulations, other than exercise of the power to suspend under regulation 5, shall not take place unless the chief officer concerned believes that in the exceptional circumstances of the case it would be appropriate for them to do so" (Regulation 6)

In November 1999, the Home Secretary issued a document entitled "Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures", which includes the following advice:

"3.21. .....As soon as the officer has been notified of the investigation he or she will be given an opportunity to give his or her account of the conduct or event(s) in question, if he or she wishes to do so. Where the officer concerned has (or should have) been notified, he or she should not be required to make a duty statement regarding the matter under investigation (this also applies where an officer has or should have been cautioned in relation to the investigation of a criminal allegation)....

Where an officer is alleged or appears to have committed a criminal offence a normal criminal investigation will take place, with the officer being cautioned in accordance with the PACE Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. However, the officer need not be informed immediately of the criminal allegation if doing so would impede the criminal investigation.

Interviews

3.23. The object of interviewing an officer about a possible failure to meet standards is twofold: first, to provide the officer concerned with a opportunity to give his or her account of the matter and, second, to enable the officer to offer any explanatory detail which might serve to explain or defend the matter. The officer may not be compelled to answer any question put to him or her during the course of the interview. Interviews should be tape recorded."

(b) United States of America

Decisions of the United States Supreme Court long ago established that compelled statements by police officers are not admissible as evidence in subsequent criminal proceedings against them, and that requiring officers to waive this

immunity will not render them admissible in such proceedings. Nor can an officer be dismissed for refusing to waive this immunity. Once such immunity has been affirmatively given, however, an officer is required to provide a statement, and can be disciplined for failing or refusing to do so. Furthermore, this requirement applies equally to "subject" and "witness" officers, and any statement so compelled, as well as any derivative evidence, can be used as evidence in subsequent disciplinary or public complaint proceedings against its maker. Officers are entitled to the assistance of counsel during any investigation into their conduct. These rules apply equally to "subject" and "witness" officers.

(c) Australia

In Australia, the common law privilege against self-incrimination has been held to be equally applicable to administrative proceedings (such as internal police disciplinary hearings) as to criminal or civil proceedings. Unlike the situation in Canada, however, where the privilege against self-incrimination, in so far as it relates to "truly penal" proceedings such as criminal and provincial offence proceedings, has been incorporated into the *Charter of Rights* as a constitutionally guaranteed right, in Australia there is no such "constitutionalization" of the privilege, and the courts have held that the common law privilege can be abrogated or withdrawn with respect to its application to particular kinds of legal proceedings, by validly enacted legislation. In a number of cases, the courts have upheld State statutes and regulations which have explicitly or implicitly withdrawn the privilege with respect to internal police disciplinary proceedings. In *Police Service Board v. Morris*, for instance, the High Court of Australia (the Australian equivalent of the Supreme Court of Canada) held that an order by a superior officer requiring a subordinate officer to answer questions in relation to an internal investigation was a lawful order, and that a regulation made under the Victorian *Police Regulation Act*, had effectively abrogated the common law privilege against self-incrimination with respect to internal police disciplinary proceedings and investigations. As a result, Morris could be disciplined for refusing (apparently on the advice of his Police Association) to answer questions about his conduct on duty when ordered to do so by a more senior investigating officer, despite the fact that his answers would have tended to incriminate him and render him liable to criminal prosecution.

In light of this and other similar cases, the situation is that in many Australian states, both "subject" and "witness" officers can be compelled to answer questions or provide statements in the course of investigations of disciplinary and public complaint matters, and their answers or statements can be used as evidence against them in subsequent disciplinary or public complaint proceedings, but usually not in criminal or civil (non-disciplinary) proceedings. The rules on this vary somewhat from state to state, however (since they are established by statutes and regulations in each state, and not subject to any over-riding constitutional requirements). In Queensland, for instance, the rules were apparently more favourable to police officers, and in 1989 a commission of inquiry recommended that the privilege against self-incrimination should be abolished with respect to internal police disciplinary proceedings, but retained with respect to criminal proceedings.

The Correctional Service of Canada

I was not able, in the time available to me, to obtain complete information about practice and policy with respect to compelled statements in the Correctional Service of Canada (CSC), many of whose employees, like police officers, have status as peace officers. I was, however, provided with a copy of their internal staff regulations relating to "Professional Standards" and "Staff Duty to Provide Evidence". The former (dated 1994) includes the statements that: "Employees have an obligation to follow the instructions of supervisors or any member in charge of the workplace", and "An employee has committed an infraction, if he or she….refuses to testify before or submit evidence to, or obstructs, inhibits or otherwise hampers any investigation which is conducted pursuant to any act of Parliament or any

investigation as defined in the Commissioner's Directive 041, "Investigations"". The latter (dated 1999) includes the following:

> "All CSC staff members, and those under contract with CSC, shall cooperate fully with a board of investigation. A board of investigation may require an employee to provide a written and/or verbal statement of his/her account of an incident, regardless of whether the employee has already done so previously.
>
> Failure to cooperate with an investigation is addressed in Commissioner's Directive 060 - Code of Discipline and in subsection 10(1) of the *Inquiries Act*."

A member of CSC's Legal Services Branch told me that compelled statements have not been much of an issue within CSC, and that the general understanding within the Service is that staff may be, and are, required to provide statements and reports, and answer questions, about their activities while on duty; that such statements, reports and answers can be used as evidence in subsequent disciplinary proceedings; and that such requirements apply to all employees regardless of whether they may be considered "subject" or "witness" officers. She did mention, however, that in preparation for the recent *Gentles* inquest (an inquest into the death of an inmate while in the custody of guards in a penitentiary), the Service's investigators had not required the officers principally involved in the incident resulting in the inmate's death to provide statements or answer questions from investigators, on the ground that such officers might have been liable to criminal charges with respect to their conduct at the time. She indicated, however, that as far as she could recall, this was the only instance in which such a "concession" had been made to CSC employees.

April 13, 2000

Professor Philip Stenning
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Dear Professor Stenning:

Thank-you for your fax of April 10 in which you seek information about police officer obligations to co-operate with investigations of public complaints and internal disciplinary matters pursuant to the Nova Scotia Police Act.

Before attempting to answer your specific questions, I think it would be helpful to outline our public complaint procedure. The public complaint procedure is set out in the Police Act Regulations. Pursuant to those Regulations a person who wishes to lay a complaint against a police officer has 30 days from the date of the incident to make a complaint to the police force, the Board of Police Commissioners, or to the Nova Scotia Police Commission. Once a complaint has been filed, a police officer will be appointed to investigate the complaint. That officer is required to attempt to resolve the matter informally. If the police officer and the complainant agree to an informal resolution, the complaint is not proceeded with.

If there is not an informal resolution, the officer who was appointed to investigate must proceed with the investigation and report to the chief whether or not the officer feels there has been a violation of the Code of Conduct and Discipline. If so, the chief will meet with the officer complained about to give that officer an opportunity to respond to the complaint. Following that meeting, the chief will make a decision as to whether or not to impose discipline. The penalties which the Chief may impose are set out in the Regulations.

If the chief finds that a disciplinary default has not been committed by the officer complained of, the complainant may initiate a review of the decision by filing a notice of review with the Nova Scotia Police Commission.

The role of the Police Commission's investigator is twofold. That person is first required to attempt to resolve the complaint informally. Where the Commission's investigator fails to resolve a matter informally, the investigator is required to proceed with the investigation. In doing so, the investigator reviews the original investigation and makes all reasonable efforts to obtain any additional evidence relating to the complaint. The Commission's investigator may question witnesses, take statements and obtain documents.

Upon completion of the investigation, the Commission's investigator may refer the complaint to the Police Review Board if the investigator is of the view that it is a valid and legitimate complaint. It is at this stage of the complaint procedure that the progress of frivolous complaints is halted. The investigator can refuse to refer the matter to the Review Board for a hearing if the investigator is of the view that the complaint is unfounded.

It should be noted that the hearing before the Review Board is a trial *de novo*. The only information that the Board receives is the document setting out the original complaint. All evidence is received through witnesses. The Review Board may affirm the penalty, dismiss the matter or substitute a finding that in its view should have been reached.

Where the Commission's investigator does not refer the matter to the Review Board, the complainant may appeal to the Nova Scotia Police Commission for an order requiring the Commission's investigator to refer the matter to the Review Board. The parties may submit written submissions to the Commission and the decision of the Commission is final.

There is no legal obligation for police officers to answer questions put to them by investigators, or to submit written statements or complete and hand over notebooks at the initial level of investigation at the police department. In other words, the Police Act is silent in this regard. Generally speaking, officers are asked to submit a report with respect to the incident and they normally do. Failure to submit a police report (when ordered to do so) with respect to the incident which gave rise to the complaint could result in disciplinary action pursuant to section *5(b)(ii)* for insubordination by disobeying or omitting or neglecting to carry out a lawful order without adequate reason. Police officers often give statements when requested to do so but not always. Because the act is silent in this regard, failure to provide a statement would not translate into a disciplinary default. If the matter moves through the process whereby the police commission investigates, section 4(4) of the regulations applies. It states as follows:

> "To enable the Commission and the Review Board to carry out their duties and functions pursuant to the Act, it shall be the duty of every member of a police force to give the member's assistance and co-operation to the Commission and the Review Board and their members and staff and to ensure that all documentation is submitted to the parties as required by the regulations."

We do not use this section to force subject members to provide statements etc because to do so, in our opinion, would not stand the test of self incrimination before the supreme courts. However, we routinely use this section with "witness officers." To this point we have never had to go beyond pointing out the provisions of section 4(4) to obtain what we require.

With respect to your question about any restrictions on the uses which may be made of such information, once provided, I would like to direct your attention to section 26 of the Act which states as follows:

> "Where the Commission designates a person to investigate a complaint, any statement or admission made during the investigation by a member of a municipal police force named in the complaint or the person who made the complaint shall not be admitted in evidence in any subsequent proceeding in respect of the complaint except with the consent of the member or the person who made the complaint, as the case may be, and the person designated to investigate for the Commission shall not give evidence nor shall any material in his file be produced at a proceeding in respect of the complaint."

The Commission investigator's first task is to attempt to effect an informal resolution. The investigator's second task is to conduct an investigation and prepare a report indicating whether the matter should be referred to the Police Review Board. Neither of these tasks can be performed if the police officers complained of will not speak to the investigator. *This* is not only harmful to investigative techniques but in many cases preclude a meaningful investigation from occurring at all. Generally speaking, police officers are reluctant to or will not give statements, sometimes upon the order of their superiors or legal counsel. The framers of the Police Act appreciated this and included section 26 in the legislation. As a result of Section 26, police officers will speak to the Commission's investigator because they know the report will not leave the investigator's file. In most cases the Commission's investigator has to show Section 26 to the officers to reassure them that their information will not be released.

I hope the above information sufficiently addresses your query, however, if further information or clarification is required, please feel free to contact me.

Yours truly,

E. Garry Mumford
Director
Nova Scotia Police Commission